In the High Court of Judicature at Madras

Dated:28-01-2005

Coram:

The Honourable Mr. Justice V.KANAGARAJ

W.P.No.6635 of 1997

1. M.Ganesan
2. M.Natarajan
3. N.Prabhakaran
4. A.M.Kumar
5. C.Vaithyalingam
6. B.Maruthabalu
7. A.Balamurugan
8. T.Rammohan
9. M.Indirani ... Petitioners

Vs.

1. State of Tamil Nadu,
   Rep. By its Secretary to Govt.,
   Municipal Administration &
   -Water Supply Department,
   Fort St. George,
   Chennai-600 009.

2. Director of Municipal Administration,
   Ezhilagam,
   Chennai-600 005.

3. Salem Municipal Commissioner,
   rep. By its Commissioner,
   Salem Corporation, Salem.

4. R.Venkatachalam,
   Jr. Assistant, Salem Corporation,
   Salem.

5. V.Dhanasekaran,
   Jr. Assistant, Salem Municipality,
   Salem.

6. R.Alamelu,
   Jr.Assistant, Salem Municipality,
   Salem.

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7. M.Thangaraj,
   Jr. Assistant, Salem Municipality,
   Salem.

8. G.R.Krishnamoorthy,
   Salem Municipality, Salem.

Respondents 5 to 8 are impleaded as per order of Court dt.23.7.1997 in W.M.P. No.16872 of 1997. ... Respondents

The writ petition is filed under Article 226 of the Constitution of India to issue a writ of Certiorarified mandamus, as stated therein.

For Petitioners : Mr. K.Sridhar
For Respondents 1 & 2 : Mr.R.Lakshmanarayanan, G.A.,
For Respondents 3 : Mr.G.Sankaran
For Respondents 4 to 8 : No appearance

O R D E R

The prayer in the petition is to issue a writ of certiorarified mandamus to call for the entire records leading to the issue of G.O.Ms.No.237, MA & WS (Election) Department dated 26.9.1996 including the abstract/annexure thereto and the consequential order of the 3rd respondent made in Na.Ka. No.6464/96/C2 dated 30.12.1996 and quash the same and to direct the respondents to implement the promotion panel made in C-2/21190/95 dated 23.6.1995 on the file of the third respondent.

2. The brief facts stated in the affidavit filed in support of the writ petition are as follows:

The petitioners 1 to 8 joined as Junior Assistants and the 9th petitioner joined as an attender in the Salem Corporation; that the post of Junior Assistant was originally covered by the Tamilnadu Municipal Service Rules, 1970 under the District Municipalities Act; that the post of Junior Assistant came under VII Category-1; that the next promotion for the post of Junior Assistants was Class V consisting of 8 categories i.e., as follows:

CLASS - V

1 Category 1 : Head Clerks
2. Category 2 : Accountants, II & II Grade Municipalities
3. Category 3 : Assessors
4. Category 4 : Assistants

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5. Category 5 : Market Superintendents
6. Category 6 : Cashiers
7. Category 7 : Store-keepers, I Grade
8.Category 8 : Revenue Inspectors

that all the above categories were promotion avenues exclusively to the Junior Assistants, provided they have passed the prescribed Departmental Tests under Rule 5 viz., Account Tests for Local Bodies or Panchayat Development Account Tests; that the petitioners have all passed the qualifying test and have also reached Selection Grade Status; that the second respondent herein has to obtain permission from the Commissioner, the third respondent herein for promotion or otherwise; that the promotion panel is prepared and circulated to the Junior Assistants calling for objection, if any and thereafter the promotion panel is finalised and approved; that the date of appointment to the service or the date of passing of the Departmental Test has been agitated before this Court several times and this Court has held in a decision reported in GAJENDRAN Vs. PALLAVARAM MUNICIPALITY; that the date of passing of the test is the relevant point for consideration in fixing the inter se seniority in the promotion panel; that the petitioners submit that on 1.6.1994 Salem Municipal Corporation was formed vide Act 29/94, which obtained approval from Governor on 17.5.1994 that Section 9 of Salem Municipal Corporation Act provides for transitional powers; that any officer or employee serving in the Municipality shall be given an option to be exercised within such time and in such manner as may be prescribed either to be absorbed in service or to be retained in the service constituted under Section 73-A of the District Municipalities Act, or to be retrenched from service; that according to Section 9(6)(b) options were called for from the existing employees of the Salem Corporation and all of them have also given their option consenting for continuity in the Salem Municipal Corporation service; that all the employees in service from 1.6.1994 have been absorbed with full service protection and they have also given their consent to continue in the newly formed Salem Corporation and their service conditions have not be altered.

3. The petitioners further submit that in proceeding in Na.Ka.No.C-2/21190/95 dt.5.5.1995 was prepared by the 3rd respondent and the relevant consideration was the date of passing of the departmental test and the objections were called for and there was only one objection from one N.Sailakshmi who was placed in 1991 panel, though she had passed Departmental test in 1988 itself, her objection was upheld and final approved list was published by the 3rd respondent in his proceedings dt.23.6.1995, wherein the 1st and 5th petitioners names were in 1985 promotion list as serial No.9 and 8 respectively that the 3rd and 8th petitioners' names were in 1986 panel; that the 3rd and 9th petitioners' names were in 1993 list; that 4th 6th and 7th petitioners' names were in 1989 panel list; that the date of passing

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of the Departmental Test was the sole criterion and the panel was prepared as per the existing rules, Government Orders and the Judgement of the Honourable Court.

4. The petitioners submit that even Act, 29 of 1994 protected the petitioners' promotion; that the Government issued new Service Rules to all the Municipal Corporation in Tamilnadu, except in Chennai in G.O.Ms.No.237 MA & WS Department dated 27.9.1996 with effects from 1.10.1996 and the same has not been notified in Tamilnadu Government Gazette; that under the new Rule 24, the initial appointment to the service is the relevant point for consideration and not the date of passing of the Departmental test; that the Rules 22, 23 and 24 are dealing with the seniority impanelment for promotion and they are governed by the saving clause under Rule 39 which safeguards the existing right of the petitioners; that suddenly to the shock and surprise, the petitioners' promotion panel dated 23.6.1995 was completely overruled and a new list was prepared in view of the proceedings of the 3rd respondent in Na.Ka.No.6464/96/C2 dt.30.12.1996 and hence the petitioners were pushed to the bottom of the panel; that the petitioners have sent several representations but their objections were brushed aside by the respondents 1 to 3; that the 3rd respondent has failed to see that the new G.O.Ms.No.237 MA & WS (Election) Department dated 26.9.1996 cannot obliterate the right accrued under the earlier service Rules under the District Municipalities Act; that Rule 39 adversely affect any person who was a member of this service on the date of coming into force of these Rules; that it is pertinent to note that the Honourable Apex Court in a decision reported in AIR 1994 Supreme Court 1641, has held that subsequent legislative action cannot deprive the employee of their existing rights and therefore the impugned G.O.Ms.No.237, MA & WS (Election) Department dated 27.9.1996 including the abstract annexure dt.30.12.1996 are illegal and ulta vires and therefore they have to be quashed.

5. The third respondent herein alone has filed counter-affidavit denying the allegations made in the writ petition stating that Rule 25 of Part II of the Tamilnadu Municipal Service Rules, 1970 lays down that the members of service shall be determined with reference to his first appointment; that Rule 26 of part II lays down that promotion should be made on the ground of merit and ability; that Rule 28 of Part II lays down that the selection committee is responsible for drawing the list of approved candidates for promotion list; that Rule 19 of Part II lays down that as soon as a person has completed his probation, he shall become eligible for full membership, provided that he has to pass the tests if any; that Rule 21 of Part II lays down that if a person has not passed the tests during the period of probation, his probation may be terminated; that Rule 1 of Special Rules Section I, the post of Assistant has been put under Class V and the post of Junior Assistant has been put under Class VII and typists including steno-typists in Class VII-A; that as per Rule 3 of Special

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Rules Section I, the persons in category in Class VII and VII A are to be promoted as Assistants; that as per Rule 1 (B) of Special Rules page 55, unless a person has passed the Account Test for Local Bodies, he shall not be appointed to any of the category in Class V or to any other higher class or category; that as per Rule 7(B) of Special Rules all the Municipalities in Salem, Coimbatore and Nilgiris Districts are taken together as a unit for the purpose of promotion; that as per Rule 9(B) of Special Rules, the Director of Municipal Administration shall call for the list of eligible persons for promotion and consolidate the list in unit-wise and in seniority-wise, place the list before the Selection Committee which shall draw the promotion panel for each class; that the Director of Municipal Administration is the Appointing Authority for the Class V candidate from the promotion panel; that Rule 25 of Part II insists that seniority shall be determined with reference to the date of first appointment, Rule 1(B) of Special Rules insist that unless a person passed the Account Tests, he shall not be appointed to Class V posts or other higher posts; that Rules 19 Part II states that a person can pass the test during the period of probation and this rule reflects that a "Junior Assistant" shall be included in the list of seniority and he may be promoted first and then pass the test during the period of probation; that though this Rule 19 reflects so, this is a safer class to be used only on the following two occasions, viz.,

(i) When a paucity of eligible candidate for promotion arises a senior most junior assistant, who does not pass the test, taking his service seniority, merit and ability in the administration he may be promoted temporarily and allowed to pass the test during the period of probation; (or)

(ii) One person to be appointed as Junior Assistant and he may be in probation in the post of Junior Assistant. This person passes the test within the period of his probation in the post of Junior Assistant. He has no experience in administration. In such occasion, a senior most Junior Assistant even though not passed the test shall be promoted to class V posts.

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It is further submitted that from the above rules it is clear that the rules are insisting experience, merit and ability for promotion; that the date of appointment shall be taken into account for fixing the seniority; that the passing of test and DOM are only an additional qualification for the promotion; that the promotion panel has to be drawn every year and once a panel is drawn the said panel automatically lapses at the end of the official year, the said

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promotion panel already exhausted in 1982 itself and thereafter no promotion panel was drawn up and as such all the promotions given are deemed to have been made on temporary basis.

6. The Government in G.O.Ms.No.1749, Rural Development and Local Administration Department dt.30.9.1982 directed the Director of Municipal Administration to draw the panel for fixing a crucial date; that thereafter so many persons were promoted to the higher posts and if they are disturbed, it will dislocate the entire administration; that the date 30.9.1996 may be taken as crucial date and a list of persons i.e., Assistant and Junior Assistant were prepared from the panel list; that it is further submitted that the promotion panel was prepared taking 1.4.1998 as crucial date and the vacancies arose after 1.10.1996 was prepared taking the date of first appointment; that the promotion panel was prepared taking the date of the first appointment and passing of the Corporation test; that several persons have not appeared for the Departmental examination in order to avoid transfer; that the junior passed tests first and the senior passed the tests later; that the facts stated above clearly show the date of appointment is to be taken into account for fixing the seniority and hence this respondent prays for the dismissal of the above writ petition.

7. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for the petitioners and the respondents 1 to 3 with no representation offered on the part of the respondents 4 to 8 what comes to be known is that the petitioners 1 to 8 joined as Junior assistants and the 9th petitioner as Attender and promoted to the post of Junior Assistant and their service conditions were originally covered by the Tamil Nadu Municipal Service Rules, 1970 under the District Municipalities Act; that their next promotion was for the post of Junior Assistant Class V which has promotion avenues provided they have passed prescribed departmental tests as per Rule 5; that the petitioners have passed the qualifying tests and have reached Selection Grade status; that the promotion panel has been prepared and circulated seeking objections and the same has been finalised and approved; that this Court on several occasions held that the date of passing of the test is relevant in fixing the inter-se seniority in the promotion panel; that the petitioners have given the option for continuity of their service in the Salem Municipal Corporation and they have been absorbed from 1.6.1994 with the service conditions not altered.

8. The further case of the petitioners is that under proceeding dated 5.5.1995, stated supra, a panel was prepared, the relevant consideration being the date of passing of the departmental test and the same was finally approved and published by the third respondenton 23.6.1995; that though the names of the petitioners were in different promotion lists of the year 1985, 1986, 1989 and 1993, since the date

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of passing of the departmental test was the sole criterion, on that basis, the panel was prepared as per the existing rules, Government Orders and judgments of the Court; that whileso, the Government have issued new service rules to the Municipal Corporations in Tamill Nadu except Chennai in G.O.Ms.No.237, MA & WS (Election) Department dated 26.9.1996 with effects from 1.10.1997 as per which the date of initial appointment to the service was made relevant for promotion and not the date of passing of the departmental test and the petitioners' promotion panel dated 23.6.1995 was completely overruled and the new list had been prepared in accordance with the new G.O. and hence the petitioners testifying the validity of the new G.O. dated 26.9.1996 and seeking to implement the promotion panel published dated 23.6.1995, have come forward to file the above writ petition.

9. Time and again, the upper forums of law including the Honourable Apex Court have held that it is the merit and ability which must be held the criterion for promotion or any advantage that could be given in the department and not the seniority and even in such event that the other conditions being equal, it should only be the merit-cum-seniority and not seniority-cum-merit which shall be the guiding factors, needless to mention that merit should be given importance. The petitioners' case is that they have passed the required departmental test which is essential for being considered for promotion and since passing of such tests would add merit to a candidate, the panel dated 23.6.1996 prepared based on such passing of the departmental test should not be over-looked by the new G.O. dated 26.9.1996 advocating a new theory that even without passing such departmental tests, based on seniority i.e., taking into consideration the service seniority one could could be promoted temporarily and thereafter allowed to pass the tests, as though so far they have been disallowed either to do the test or to pass the same and that the chances of the petitioners' in getting their due promotion have been overlooked and therefore they have come forward to seek the relief sought for.

10. Passing of a test definitely adds credit and merit since it would go to prove the importance of knowledge of a particular candidate in the field in which he is operating or the subject that he is discharging and such of the merit annexed by such candidates cannot be sidelined merely stating that it is only an additional qualification as though it would not add merit to the person passing such tests, which cannot be taken as an acceptable argument and therefore, it should only be concluded that a person who is passing the required departmental tests in time should be taken as a more merited person than those who have to pass such tests later and since it is the merit and ability that should alone be given credence to and not mere seniority as decided in many landmark judgments of the Honourable Apex Court and different High Courts in the country, it has to be held in the case in hand that the petitioners have put up a

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very strong case which must be allowed and the same is ordered accordingly.

In result,

(i) The above writ petition succeeds and it stands allowed.

(ii) The order passed by the first respondent in G.O.Ms.No.237 M.A. & WS (Election) Department dated 26.9.1996 and the consequential order of the third respondent made in Na.K.No.6464/96/C2 dated 30.12.1996 are hereby quashed.

(iii) The respondents are hereby directed to impalement the promotion panel made in C-2/21190/95, dated 23.6.1995 on the file of third respondent and promote the petitioners accordingly.

However, in the circumstances of the case, there shall be no order as to costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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1. The Secretary to Govt.,
   State of Tamil Nadu,
   Municipal Administration &
   Water Supply Dept.,
   Fort St. George,
   Chennai-600 009.

2. Director of Municipal Administration,
   Ezhilagam,
   Chennai-600 005.

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3. Salem Municipal Commissioner,
   [Salem Municipal Commissioner]
   Salem Corporation,
   Salem.

One cc to Govt. Pleader, SR.3776.

One cc to Mr.K. Sridhar, Advocate SR.3218.

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